

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

DEC -1 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD W.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
ALEXIS F.,

Appellees.

2 CA-JV 2009-0078
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18693800

Honorable Leslie Miller, Judge

AFFIRMED

Joan Spurney Caplan

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Chief Judge.

¶1 Richard W. challenges the juvenile court’s order terminating his parental rights to his daughter, Alexis F., after it found he had failed to appear for the initial termination hearing on the Arizona Department of Economic Security’s (ADES) motion to terminate his parental rights. We will not disturb a juvenile court’s order terminating a parent’s rights unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We view the evidence in the light most favorable to upholding the factual findings upon which the order is based. *See Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). We affirm the termination order in this case.

¶2 ADES filed a dependency petition in May 2008, alleging Richard had “taken no steps to care for or protect his daughter” and had a “history of substance abuse, including cocaine and marijuana.” The petition alleged that, approximately fourteen months earlier, Richard had agreed to send Alexis to live with her maternal grandmother, who then relocated to Arizona. He had not provided the grandmother with legal authority over Alexis or a “means to access medical care” for her. He had had only sporadic contact with Alexis and, at the time of the petition, had not seen her for over a year. The grandmother contacted a Child Protective Services (CPS) investigator, telling her she could no longer care for Alexis, and requested CPS take custody of her.

¶3 Richard admitted similar allegations in an amended petition.¹ The juvenile court adjudicated Alexis dependent and approved a case-plan goal of family reunification. Richard participated in some reunification services in Texas, where he resides. In March 2009, the court changed the case-plan goal to concurrent goals of reunification and severance and adoption. At the permanency planning hearing in June 2009, the court found severance and adoption to be the appropriate plan and directed ADES to file a motion to terminate Richard’s parental rights. The motion alleged mental illness or chronic substance abuse and length of time in care as grounds for termination. The court set an initial severance hearing and notified Richard in accordance with Rule 64(C), Ariz. R. P. Juv. Ct., that, if he failed to appear at the hearing without good cause, he could be deemed to have waived his legal rights and have admitted the allegations of the termination motion. ADES further notified him that the hearing could go forward in his absence and “result in the termination of [his] parental rights based upon the record and the evidence presented to the court.”

¶4 The juvenile court permitted Richard to appear telephonically at the initial termination hearing. After contacting Richard at or just prior to the hearing, however, the court lost telephone contact with him and was unable to reestablish it. Richard’s counsel stated on the record: “[W]e’ve attempted to contact [Richard] telephonically and did get him

¹The amended petition did not include the allegation that Richard had “taken no steps to care for or protect Alexis.” It stated that Richard had paid child support for Alexis and that he had thought Alexis’s move to her grandmother’s home would be a temporary situation but that it was the safest environment for her.

on the phone one time. He said he couldn't hear us. We tried him again[,] and it's gone to his voice mail." The court found Richard "unavailable," stating:

I do believe and think [counsel] is aware of my position on this happening as we sat here trying to connect with him, that he knew that he was there. He understood it was the Court calling him. We asked him to move to another location. Not only did we get disconnected but then he is now not answering his phone. He knows this is the time for the hearing. We found him—he's had notice and he has chosen not to make himself available.

The court stated further in its minute entry from the hearing:

THE COURT notes that [counsel] attempted to reach [Richard] telephonically. Contact was made with [Richard] who indicated he was in a library, however, reception was poor. The Court directed [Richard] to move to a different location to allow for better reception, and indicated that the Court would call him again. The court then attempted to call [Richard] but he did not answer.

. . . .

THE COURT notes that [Richard] was aware his severance hearing was set this date, he answered the Court's call and was aware that the Court intended to call again, yet he failed to answer the telephone.

ADES moved to proceed in Richard's absence. Over counsel's objection, the court did so, finding Richard had notice of the hearing and voluntarily had absented himself from it. Following ADES's presentation of evidence, the court terminated Richard's parental rights based on both grounds alleged and determined that termination was in Alexis's best interests.

¶5 On appeal, Richard contends the juvenile court abused its discretion and denied him due process of law by proceeding with the hearing without him. He argues he "did not

fail to appear, nor did he fail to appear without good cause shown,” and he contends the court’s finding that he had “chosen not to make himself available” was insufficient under Rule 65(C)(6)(c), Ariz. R. Juv. Ct., and unsupported by the record. We disagree.

¶6 Enacting procedures to give effect to A.R.S. § 8-863(C), Rule 65(C)(6)(c) provides:

If the parent . . . fails to appear at the initial termination adjudication hearing without good cause shown and the court finds the parent . . . had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent . . . and that failure to appear may constitute a waiver of right, and an admission to the allegations contained in the termination motion or petition, the court may proceed with the adjudication of termination based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights.

Arizona courts have repeatedly approved the use of this procedure in termination proceedings. *See, e.g., Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, ¶¶ 13-15, 181 P.3d 1126, 1130 (App. 2008) (applying like provision in Rule 66(D), Ariz. R. P. Juv. Ct.); *Christy A. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 299, ¶¶ 12-19, 173 P.3d 463, 467-69 (App. 2007) (same). A juvenile court has broad discretion in determining good cause for a failure to appear, and we will not reverse the court’s order unless the court’s “exercise of that discretion was ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶ 15, 158 P.3d 225, 230 (App. 2007), *quoting Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 19, 107 P.3d 923, 929 (App. 2005).

¶7 In this case, although the juvenile court initially reached Richard by telephone, it was unable to do so again after the connection was lost; it received only a voice-mail message in response to its subsequent call or calls.² Richard did not participate in the hearing, and the court’s finding that Richard had failed to appear was thus supported by the record. Although Richard offers several hypothetical explanations on appeal for his failure to appear, he did not offer any evidence of any reason for his failure below either during or after the hearing. The record shows merely, as the court pointed out, that Richard knew the hearing was to take place at the date and time it did; he knew the court had called and intended to call again, yet he did not answer his telephone. He did not assert below, nor has he even claimed on appeal, that he was, in fact, unaware of a subsequent call or was unable to answer it. And he apparently made no attempt to contact the court himself after the original call was disconnected. The court did not abuse its discretion in determining Richard had failed to show good cause for his absence, a finding implicit in the court’s statement that Richard had simply “chosen not to make himself available.”

¶8 Further, the juvenile court’s findings were sufficient under Rule 65(C)(6)(c) to permit it to proceed in Richard’s absence. Richard contends the court “failed to make a finding that [his] failure to appear was voluntary, knowing and intelligent,” but the court expressly found in its minute entry ruling that Richard’s absence was “voluntary.” And a finding that Richard’s waiver of his rights had been knowing and intelligent was implicit in

²Richard claims the court made only one call after the first was disconnected. The record, however, shows only that the court attempted to call again. It does not disclose how many attempts the court made.

the court's statements quoted above. Also, as noted above, the court implicitly found Richard had failed to show good cause for his failure to appear.

¶9 Having found no error in the juvenile court's proceeding in Richard's absence, we need not address Richard's arguments that any error was not harmless. Richard has not argued insufficient evidence was presented at the hearing to support the grounds for termination or the court's determination that termination of his parental rights was in Alexis's best interests.³ We, therefore, affirm the juvenile court's termination order.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE A. VÁSQUEZ, Judge

³Within Richard's harmless error analysis he states that he "did not do nothing on his case plan" and "[i]t is questionable if this meets the quantum of evidence necessary to terminate" However, in the same sentence, he states "and if Appellant had been permitted to exercise his trial rights at a later trial, there may have been insufficient evidence to prove a severance on either ground." Taken in context, Richard's argument relates to his absence from the hearing, and not the evidence presented in his absence.